(2)

Supreme Court, U.S.
FILED
NOV 22 1995
CLERK

No. 95-666

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1995

MATTHEW B. GOODALL, An Infant, By His Father And Next Friend, Robert B. Goodall, and Robert B. Goodall and Kathleen N. Goodall,

Petitioners,

v.

STAFFORD COUNTY SCHOOL BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Kathleen S. Mehfoud
D. Patrick Lacy, Jr.
HAZEL & THOMAS, P.C.
411 East Franklin Street, Suite 600
Richmond, Virginia 23219
(804) 344-3400

BEST AVAILABLE COPY

21

QUESTIONS PRESENTED

1. Whether the Goodalls' case is barred by res judicata.

2. Whether requiring parents to pay the costs associated with the education of their son, voluntarily placed by them in a sectarian school, substantially burdens their free exercise of religion.

3. Whether a public school board can be compelled under the Establishment Clause to provide services at a sectarian school when those services are made available for free in its schools.

LIST OF PARTIES

Petitioner, Matthew B. Goodall, formerly an infant, brought suit by his father and next friend, Robert B. Goodall. Petitioners, Robert B. Goodall and Kathleen N. Goodall, are the parents of Matthew B. Goodall.

Stafford County School Board, the Respondent, operates the public school system in Stafford County, Virginia pursuant to the Constitution and Statutes of Virginia.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CITATIONS v

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

ARGUMENT 7

A. THE GOODALLS' CASE IS BARRED BY RES JUDICATA 7

B. REQUIRING PARENTS TO PAY THE COSTS ASSOCIATED WITH THE EDUCATION OF THEIR SON, VOLUNTARILY PLACED BY THEM IN A SECTARIAN SCHOOL, DOES NOT SUBSTANTIALLY BURDEN THEIR FREE EXERCISE OF RELIGION 8

C. A PUBLIC SCHOOL BOARD CANNOT BE COMPELLED UNDER THE ESTABLISHMENT CLAUSE TO PROVIDE SERVICES AT A SECTARIAN SCHOOL WHEN THOSE SERVICES ARE MADE AVAILABLE FOR FREE IN ITS SCHOOLS 12

CONCLUSION 13

TABLE OF CITATIONS

PAGE

Cases

Abdur-Rahman v. Michigan Department of Corrections, 65 F.3d 489, 492 (6th Cir. 1995) 9

American Life League, Inc. v. Reno, 47 F.3d 645, 654 (4th Cir. 1995), cert. denied, ____ U.S. ____, (1995) . 11

Bowen v. Roy, 476 U.S. 693, 699-700 (1986) 13

Braunfeld v. Brown, 366 U.S. 599, 605 (1961) 10

Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995) . . . 9

Christianson v. Colt Industries, 486 U.S. 800, 830 (1988) 8

Commissioner v. Sunnen, 333 U.S. 591, 597 (1948) . . . 8

Employment Division, Dept. of Human Resources of Or. V. Smith, 494 U.S. 872, 878-79 11

Frazee v. Illinois Dept. of Employment Section, 489 U.S. 829 (1989) 11

Goodall v. Stafford County School Board, 60 F.3d 168 (4th Cir. 1995) 2, 8, 9, 11, 13

Goodall v. Stafford County School Board, 930 F.2d 363, 369 (4th Cir. 1991), cert. denied, 502 U.S. 864 (1991) 2, 5-8

Harris v. McRae, 448 U.S. 297, 317-18 (1980) 10

Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987) 11

Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303, 306 (6th Cir. 1983), cert. denied, 464 U.S. 815 (1983) 10

McCarthy v. Hornbeck, 590 F. Supp. 936, 945 (D. Md. 1984) 10

Parklane Hosiery Company v. Shore, 439 U.S. 322, 326 (1979) 8

Regan v. Taxation Without Representation of Washington, 461 U.S. 540, 546 (1983) 10

Rosenburger v. University of Virginia, ___ U.S. ___ (1995) 13

Rust v. Sullivan, 500 U.S. 173, 193 (1991) 10

Sherbert v. Verner, 374 U.S. 398 (1963) 11

Thomas v. Review Board of the Indiana Employment Section Division, 450 U.S. 707 (1981) 11

Werner v. McCotter, et al., 49 F.3d 1476, 1480 (10th Cir. 1995) 9

Zobrest v. Catalina Foothills School District, ___ U.S. ___, 113 S. Ct. 2462 (1993) 5, 8

Statutes

20 U.S.C. §§ 1400, et seq., Individuals with Disabilities Education Act 2, 5-8

28 U.S.C. § 1254 3

42 U.S.C. §§ 2000bb to 2000bb-4, Religious Freedom Restoration Act of 1993 . . . . . 2, 6, 8, 9, 11

Constitution

Establishment Clause of the First Amendment to the Constitution of the United States . . . . . i, 2, 5, 6, 12, 13

Free Exercise Clause of the First Amendment of the Constitution of the United States 2, 8, 11, 12

Other Authorities

Fed. R. Civ. P. 52(c) 6

No. 95-666

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1995

MATTHEW B. GOODALL, An Infant, By His Father And Next Friend, Robert B. Goodall, and Robert B. Goodall and Kathleen N. Goodall,

Petitioners,

v.

STAFFORD COUNTY SCHOOL BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Stafford County School Board, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners in this case.

OPINIONS BELOW

The U.S. Court of Appeals for the Fourth Circuit, on July 27, 1995, ruled in favor of Stafford County School Board ("Stafford") and affirmed the District Court's grant of judgment as a matter of law pursuant to Federal Rule of Civil Procedure 52(c). Goodall v. Stafford County School Board ("Goodall II"), 60 F.3d 168 (4th Cir. 1995). The Court of Appeals found that the denial by Stafford of a cued speech interpreter at a private sectarian school did not constitute a substantial burden under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb to 2000bb-4 or under the Free Exercise Clause. The Court of Appeals also held that the Establishment Clause of the First Amendment to the Constitution of the United States did not mandate the provision of the interpreter's services at the private school and that any challenge under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400, et seq., was barred by its prior ruling in Goodall v. Stafford County School Board ("Goodall I"), 930 F.2d 363, 369 (4th Cir. 1991), cert. denied, 502 U.S. 864 (1991). The Court of Appeals' opinion is reproduced in the Appendix to the Petition for Writ of Certiorari. (App. 1-11).

The decision of the U.S. District Court for the Eastern District of Virginia, Alexandria Division, entered on March 29, 1994, granting judgment in favor of Stafford County School Board is set forth in the Appendix to the Petition for Writ of Certiorari. (App. 12-16).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no additions to the constitutional and statutory provisions cited by the Petitioners.

STATEMENT OF THE CASE

Stafford County School Board ("Stafford") operates the public school system in Stafford County, Virginia. Matthew Goodall is a resident of Stafford County, Virginia, but, at the choice of his parents, attended Fredericksburg Christian School, a private sectarian school. Fredericksburg Christian School is located in the City of Fredericksburg, Virginia, and not in Stafford County.

Matthew Goodall has been profoundly deaf since the age of three and was identified by Stafford as a student with disabilities. In 1993, at the request of the Goodalls, Stafford developed an individualized education plan ("IEP") for Matthew. The IEP would have enabled him to receive a free appropriate public education in the public schools. The appropriateness of the IEP was conceded by the Goodalls.

The IEP specified that Matthew would have an interpreter for his classes, would receive speech and

language services and would receive mathematics instruction in a learning disabilities class. The Goodalls declined all services but the interpreter and requested that the interpreter serve Matthew at the Christian school.

An interpreter is capable of serving more than one disabled student at a time. Interpreters are not provided on a one-on-one basis unless there would be no other deaf student in the same class or activity. There could have been an opportunity for Matthew to share an interpreter with another student for some activities and classes. The incidence of deaf students is rare and pooling of educational resources in a single program addresses administrative and cost concerns.

Stafford took no action to prevent Matthew from attending the sectarian school. Matthew attended the Christian school chosen by his parents and graduated in June 1995. In dispute are the costs of the interpreter services provided since January 1992 by the Goodalls, at an approximate cost of $14,000 annually.

It is the practice of the Stafford County School Board to serve students with disabilities in its established public school programs if a free appropriate public education is available within those programs. As noted, the Goodalls admit that there was an appropriate program available to Matthew in the public schools. Only if a free appropriate public education is not available within the Stafford County Public Schools, would Stafford place a student in a private school or in another public school so that appropriate services would be provided.

This policy is generally applied to all students. Religion is not a determining factor for these placement decisions. The religious beliefs of the Goodalls played no part in Stafford's decision that Matthew could be appropriately served in the public school or in the denial of an interpreter at the Christian school. The Fourth Circuit held that this policy was neutral in application and did not impose a substantial burden on the Goodalls.

This case has a lengthy procedural history. In 1988, the Goodalls first challenged Stafford's refusal to pay for a cued speech interpreter for Matthew at Fredericksburg Christian School. In their suit, the Goodalls alleged that they were entitled to this payment pursuant to the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. The Goodalls also alleged that the Establishment Clause of the First Amendment to the Constitution of the United States did not prohibit the provision of the interpreter at the Christian school site. The Goodalls' Petition to this Court erroneously portrays this earlier case as being decided solely on the issue of the Establishment Clause. The Fourth Circuit ruled against the Goodalls on both grounds, and this Court denied the subsequent Petition for Writ of Certiorari. See Goodall I, supra.

Subsequent to the Fourth Circuit's ruling, this Court held in Zobrest v. Catalina Foothills School District, ___ U.S. ___, 113 S. Ct. 2462 (1993), that the Establishment Clause did not bar the provision of a cued speech interpreter at a sectarian school. The ruling, however, left undisturbed the Fourth Circuit's decision in Goodall I that the provision of the interpreter's services at

the sectarian school was not required under IDEA. Relitigation of this IDEA issue is foreclosed by the decision in Goodall I.

The Goodalls filed this second suit in U.S. District Court for the Eastern District of Virginia, Alexandria Division, on September 23, 1993, and again sought payment for an interpreter. The Goodalls alleged, in this latest proceeding, that the refusal to provide the cued speech interpreter imposed a substantial burden on their free exercise of religion and violated RFRA. The Goodalls' claim under RFRA was made in an amended pleading. Consideration of this particular amendment was objected to by Stafford because the amendment had not been authorized by the District Court. The District Court, however, heard the claim and granted judgment as a matter of law at the close of the Goodalls' case under Fed. R. Civ. P. 52(c). The District Court determined that the Goodalls had not established the existence of a substantial burden on their free exercise of religion.

The Court of Appeals for the Fourth Circuit affirmed the District Court's judgment and found additional reasons to deny relief to the Goodalls. The Court of Appeals held that its prior ruling in Goodall I finding that the interpreter was not required under IDEA could not be relitigated. The Court of Appeals also held that there was no substantial burden on the Goodalls' free exercise of religion and thus no violation of any right granted by the First Amendment to the Constitution of the United States or by RFRA. The Court of Appeals also found that the Establishment Clause did not mandate that Stafford provide services at the sectarian school.

ARGUMENT

A. THE GOODALLS' CASE IS BARRED BY RES JUDICATA.

Stafford has offered a free appropriate public education for Matthew in the public schools. This fact is conceded by the Goodalls. The parents, however, have elected to reject that program and have chosen to place Matthew in a private religious school. It has previously been conclusively and finally held that Stafford was in full compliance with the requirements of IDEA when it offered Matthew an appropriate program in the public school.

Nonetheless, the Goodalls' argue throughout their Petition that there is an obligation arising under IDEA which compels the provision of the requested services. Petition for Writ of Certiorari, pp. 11, 14-15. This argument is without merit and is contrary to the prior final decision in this case.

In Goodall I, the Fourth Circuit held:

> In short, by offering Matthew the services of a cued speech interpreter at [the public school], the County is in full compliance with the requirements of the [IDEA] and the regulations promulgated thereunder. If the County's offer of services in a public school is "meaningless" to Matthew as his parents claim, it is because of the parents' decisions and conditions for Matthew's education, not by the operation of any state or federal law.

Id. at 369.

Under the law of this case, the IDEA does not require that the IEP services which have been offered for free in the public school be duplicated for Matthew at the Christian school. The Court of Appeals noted in Goodall II that this portion of Goodall I was not overruled by Zobrest and was not capable of being challenged in the instant appeal. Goodall II, at 173; see also, Christianson v. Colt Industries, 486 U.S. 800, 830 (1988). The issue of entitlement to the interpreter under IDEA cannot be relitigated in this case under the principles of res judicata. Parklane Hosiery Company v. Shore, 439 U.S. 322, 326 (1979). Commissioner v. Sunnen, 333 U.S. 591, 597 (1948). This issue does not warrant review by this Court.

B. REQUIRING PARENTS TO PAY THE COSTS ASSOCIATED WITH THE EDUCATION OF THEIR SON, VOLUNTARILY PLACED BY THEM IN A SECTARIAN SCHOOL, DOES NOT SUBSTANTIALLY BURDEN THEIR FREE EXERCISE OF RELIGION.

The Court of Appeals correctly held that there was no substantial burden on the Goodalls' free exercise of religion under RFRA or under the Free Exercise Clause. Both legal challenges require proof of the existence of a substantial burden. No substantial burden is created by the failure of the Goodalls to accept the offer of free services made by Stafford.

In order to establish a violation of RFRA, it was necessary for the Goodalls to prove a substantial burden on

their free exercise of religion. 42 U.S.C. § 2000bb-1(a). Even if there were a substantial burden, the burden would be permissible if justified by a compelling government interest. 42 U.S.C. § 2000bb(b). The Goodalls failed even to establish the existence of a substantial burden thereby obviating the need for Stafford to show a compelling government interest in this circumstance.

The Court of Appeals correctly found that there was no substantial burden under RFRA. In reaching this conclusion, the Court of Appeals applied existing case law to determine if a substantial burden existed. The Court of Appeals held that RFRA had not modified the standard by which the existence of a substantial burden would be determined. Goodall II, at 171. This analysis by the Court of Appeals is consistent with decisions of other circuits. See, Abdur-Rahman v. Michigan Department of Corrections, 65 F.3d 489, 492 (6th Cir. 1995); Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995); Werner v. McCotter, et al., 49 F.3d 1476, 1480 (10th Cir. 1995). The stated intent of RFRA as set forth in the Act was ". . . to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." (App. 19-20). No modification to the substantial burden test was included. Thus, the Court of Appeals was correct in holding that RFRA did not affect prior law construing whether a substantial burden had been imposed.

No substantial burden was established by the Goodalls. The Goodalls have refused the free services offered by Stafford and have voluntarily assumed the costs of the private school. Their refusal of the free services

does not constitute a substantial burden. Citing prior decisions of this Court, the Court of Appeals correctly held that a policy which makes the exercise of religious beliefs more expensive while still allowing the individual to pursue their religious beliefs, imposes no substantial burden. Braunfeld v. Brown, 366 U.S. 599, 605 (1961); Regan v. Taxation Without Representation of Washington, 461 U.S. 540, 546 (1983); Rust v. Sullivan, 500 U.S. 173, 193 (1991); and Harris v. McRae, 448 U.S. 297, 317-18 (1980). See also, Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303, 306 (6th Cir. 1983), cert. denied, 464 U.S. 815 (1983); McCarthy v. Hornbeck, 590 F. Supp. 936, 945 (D. Md. 1984). As these cases demonstrate, the Goodalls simply have no affirmative statutory entitlement to have their religious beliefs subsidized by state or federal funds.

The fact that the exercise of religious beliefs may have been made more expensive by the refusal to provide an interpreter does not impose a substantial burden. In the instant case, the only issue is who is going to pay for the interpreter's services. Contradictorily, the Goodalls were willing to pay all other costs of Matthew's education at the sectarian school, including tuition and transportation costs. They do not allege that the payment of those expenses burden their free exercise of religion. It is the additional cost of the interpreter which they allege causes the burden.

The Goodalls have pursued the exercise of their religious beliefs free from any government compulsion. Matthew attended and graduated from the religious school of their choice. Although the pursuit of the Goodalls'

religious beliefs may have been made more costly, this fact does not arise to a substantial burden.

It is for this same reason that the unemployment compensation cases cited by the Goodalls are inapposite. See Frazee v. Illinois Dept. of Employment Section, 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987). Thomas v. Review Board of the Indiana Employment Section Division, 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). The Court of Appeals appropriately determined that these cases were not applicable to the Goodalls' situation because the Goodalls had "neither been compelled to engage in conduct prescribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take. Rather, they must pay for a[n interpreter] if they decide to keep Matthew in a sectarian school and forego the advantages offered by the public school system in Stafford County." Goodall II, at 172-3. Thus, no substantial burden existed under RFRA.

Nor does a substantial burden exist under constitutional law. The Fourth Circuit correctly held that the policy of offering services at the public school when appropriate did not violate the Free Exercise Clause regardless of how it was analyzed. A neutral policy of general applicability does not offend the Free Exercise Clause even if there is an incidental effect on religious practice. Employment Division, Dept. of Human Resources of Or. V. Smith, 494 U.S. 872, 878-79; American Life League, Inc. v. Reno, 47 F.3d 645, 654 (4th Cir. 1995), cert. denied, ____ U.S. ____, (1995). As

noted earlier, the Court of Appeals found that the policy did not impose a substantial burden on the Goodalls' free exercise of religion. Thus, the Fourth Circuit correctly held that there was no violation of the Free Exercise Clause in this case whether judged by the substantial burden test or by the neutrality test.

Matthew's situation is not different from that of any student whose parents have chosen to place him in a private school, whether sectarian or non-sectarian. Basically, the Goodalls argue that, because an education is available free in the public schools, there is a burden on their free exercise of religion if the parents must pay for those same services at a private school. If this argument is accepted, school boards would have to pay tuition for all students who attend sectarian schools because of their religious beliefs even though there is a free appropriate public education available to them in the public schools. This result is not required under the Free Exercise Clause.

C. A PUBLIC SCHOOL BOARD CANNOT BE COMPELLED UNDER THE ESTABLISHMENT CLAUSE TO PROVIDE SERVICES AT A SECTARIAN SCHOOL WHEN THOSE SERVICES ARE MADE AVAILABLE FOR FREE IN ITS SCHOOLS.

The Goodalls seek through the Establishment Clause to require Stafford to modify its policy so that Matthew's education at the sectarian school would be subsidized. The Court of Appeals correctly held that the Establishment Clause determines whether services may be provided at the sectarian school. The Establishment

Clause, however, cannot be utilized to mandate the provision of those services. Goodall II, at 173; see also, Bowen v. Roy, 476 U.S. 693, 699-700 (1986). This result has not been changed by Rosenburger v. University of Virginia, ___ U.S. ___ (1995) ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."). Thus, the Goodalls' Establishment Clause claim was appropriately denied.

CONCLUSION

For the reasons stated above, the Stafford County School Board respectfully requests that the Petition for Writ of Certiorari be denied.

STAFFORD COUNTY SCHOOL BOARD

By Kathleen S. Mehfoud
Counsel

Kathleen S. Mehfoud
D. Patrick Lacy, Jr.
HAZEL & THOMAS, P.C.
411 East Franklin Street, Suite 600
P.O. Box 788
Richmond, Virginia 23206
(804) 344-3400

Counsel for the Stafford County School Board